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LETTER

TO

ROBERT MACQUEEN  
LORD BRAXFIELD,

ON HIS PROMOTION  
TO BE ONE OF THE JUDGES  
OF THE  
HIGH COURT OF JUSTICIARY.

EDINBURGH:

PRINTED IN THE YEAR M,DCC,LXXX.

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МАТЕРИАЛА.



HIGH COURT of JUSTICE

A

L E T T E R

TO

L O R D B R A X F I E L D.

IT is not the intention of this letter to pay your Lordship compliments on your promotion to a seat in the Supreme Criminal Court of Scotland. These you may have from other quarters. But when a man of such eminence for knowledge in Law, and of such distinguished vigour of mind, is appointed one of the Lords of Justice, it is deemed a very fit opportunity for publickly submitting some considera-

tions

rations upon the duties of that important office with which your Lordship is now entrusted.

THE preamble of those statutory provisions by which the Court of Justiciary was in the year 1672, established in its present form, should ever be kept in mind,—“ Seeing causes criminal are “ of the greatest importance, and may “ extend to the lives and liberties of “ any of his Majesty’s subjects, and “ their persons and fortunes: And “ seeing the punishment of crimes is “ of the greatest consequence for the “ safety and security of his Majesty’s “ person and authority, and the peace “ and quietnes of the kingdom; and “ therefore matters criminal ought to “ be determined in the most solemn, “ exact and regular way.”

*sober and quiet*

SOLEMNITY

SOLEMNITY in the administration of judicial proceedings concerning life and death, is indeed the most essential requisite, and should be religiously maintained. In Pagan jurisprudence, lawyers are called “*antistites justitiae*, “ Priests of justice.” And in the sacred volume of Revelation, the magistrate or judge who beareth the sword, is held out to us as the “*Minister of God*.” Above all, then, a constant attention to piety, is the duty of a Criminal Judge; without piety there can be no true solemnity, none of that awful reverence which makes a deep impression upon the human mind, and contributes so much to the principal purpose of a Criminal Court, the prevention of crimes.

AN irreligious man, therefore, who accepts of the office of a Criminal Judge,

Judge, is as much an impostor, as if he accepted of the office of a Clergyman. In both cases, let the person be ever so much a *freethinker*, he is certainly a cheat; for, he fraudulently receives from society, the honours and emoluments of a character, which he knows himself not to be.

THIS remark will be approved of by your Lordship. For, with an impetuosity of animal spirits, and higher passions than ordinary, you are steady in your belief of the great doctrines of our holy religion. This is well known to those who know you best. It is honourable to yourself, and comfortable to them; honourable that a man of your superior abilities has the candour to submit his mind to the evidence of what we cannot fully comprehend; comfortable that such a man unites  
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the weight of his opinion to confirm the hopes, without which the life of every thinking being, who is not dull indeed, must be very dreary. But it is not enough that a Criminal Judge is possessed of the best principles. His external behaviour is of real importance, and if either from too strong a consciousness of rectitude of intention, or from an overweening conceit of his being above paying a due regard to that article, he is careless of it, we must pronounce that he does not execute his office with fidelity. Duty in general, is restraint; and he whose propensities to levity are so quick and frequent, that he cannot restrain them, is unfit for the duty of a Criminal Judge. There is required, what *Prior* elegantly calls “*a grace, a manner, a decorum.*” Not the fantastical grace and unnatural manner recommended by

Lord *Chesterfield*, but that becoming dignity, that grave *decorum*, which is suited to a person elevated above his fellow subjects, as the vicegerent of Majesty in the greatest power which man can have over man. Far from the Bench of the High Court of Justiciary be the vulgar familiar phrase; but farther still be that “*foolish jesting*” which is so incompatible with the solemn business of the Court, and would be so offensive in any of its Judges.

AND as the King himself is bound by his coronation-oath, “to administer justice in mercy,” so the King’s Criminal Judges, should, upon all occasions, appear humane; not eager to seize upon victims for punishment, but rather desirous that unhappy prisoners who stand before them in dread suspense should be found innocent; and

and if they are found guilty by the verdict of a jury, should with regret denounce the necessary vengeance of the law, consoling them at the same time with hopes of obtaining mercy at a higher Tribunal.

With all deference to dignity of place, and from a sincere wish to do good, it is humbly suggested to your Lordship, that the conduct of a criminal trial in Scotland, is not always just what we could wish to see. The very word *trial*, implies an inquiry into the truth or falsehood of an accusation. In England, the audience are really sensible that an inquiry is making. The prisoner who pleads not guilty, is officially hailed with “God send you a good deliverance:” And the Judge takes the evidence with an even unprejudiced candour, which is wonderfully

wonderfully fair. But, my Lord, have you never observed, that a criminal trial in Scotland appeared on the part of the Judges, not so much an inquiry whether the prisoner was guilty, as an anxious study that one already known to be guilty should not escape? Has your Lordship never remarked in the Justiciary Court, that when witnesses were swearing *against* the prisoner, their testimony was received by the Bench with full credibility; but that when swearing *for* him, distrust and suspicion were evidently expressed? Yet in England there is much better ground for prepossession against a prisoner standing trial; because he has already had an indictment found against him by a grand jury of his countrymen. Whereas in Scotland, a prisoner is brought to trial upon the sole opinion of the Lord Advocate, the Solicitor-

litor-General, or more frequently the opinion of one of the Gentlemen to whom the Lord Advocate's official power in this respect is delegated.

THE difference between criminal proceedings in England and Scotland, is partly owing to there being a better *spirit of office*, more propriety of behaviour, and a more civilized mildness of manners on the south of the Tweed than on the north; but may perhaps be chiefly ascribed to the custom of prisoners being allowed counsel in Scotland during the whole course of the trial. These counsel, ambitious of being *miseris presidium reis*, are generally understood to take the part of their wretched clients with such warmth and eagerness, and so much more is thought to be allowable in those who are saving a man's life than in those who

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are taking it away, that the Judges have supposed some of their weight was necessary for the other side of the bar, to keep the balance as it should be. But by leaning one way continually, do they not lean too much? Is there not too great a contrast between their behaviour and that of the English Judges who act as counsel for the prisoner? Is it becoming to see whispers going on between any of our Judges and the counsel for the Crown? or perhaps a Crown-agent? Is it right that a witness's evidence in a precognition which has probably been uttered carelessly, and taken down inaccurately, should be lying before a Judge, while he is examining that witness under the most awful recollection? Is it quite fair, that when the witness swears differently from the precognition, and in favour of the prisoner, such looks and shrugs

shrugs should pass, as cannot but indicate to the jury, that he is not swearing as he should do? If such circumstances ever happen, would it not be better that they were avoided? Cannot the Judges correct the keenness of a prisoner's counsel with moderation, and without being counsel against him? And may not their keenness be increased by the opposite inclination of the Judges? For that naturally enough produces a competition between the Bench and the Bar, which is not decent. If, after such a competition a prisoner escapes, is it agreeable that there should appear to be a triumph over the disappointed Bench? If he is condemned to die, is it not to be feared, that "instances of chastising criminals would readily be misapprehended for so many acts of violence

" violence and oppression, the effects  
" of malice even in Judges \*." -

THE maxim, that " it is better ten  
" guilty persons escape, than one in-  
" nocent person suffer," should be  
hung up in a conspicuous place in all  
our Criminal Courts, and be ever pre-  
sent to the mind of a Criminal Judge,  
whose influence, even when he does  
not intend it, operates so much on  
the jury. But is there not, my Lord,  
too often an intention discovered by  
the Bench, to direct and controul the  
jury?

WHILE points of law or of form are  
agitated in the course of a trial, it is  
the part of the Judges to give full light  
and instruction to the jury. But ought  
the Judges to discover to the jury, the  
opinion

\* Historical Law Tracts, Vol. I. p. 5.

opinion which they have formed as to the fact? And after the jury have returned a verdict upon their great oaths, have the Judges any right to censure that verdict, because the jury have not entertained the same notions of the nature of evidence in general, or of the evidence upon that trial in particular, that the Judges have done? Sometimes a jury are addressed with a complimentary approbation of their verdict by the Judges. A sensible and spirited jury will not relish such praise. *Timeo Danaos, et dona ferentes.* They will take warning from the fate of a gentleman in London, who having been drunk one evening at a gaming-house, was visited next morning by a person who brought him three hundred guineas, which the person said the gentleman had won of him the night before. The gentleman declared he recollects no-

[ 18 ]

thing of the matter ; but the person being positive, he took the money. In half an hour after, another person who was in combination with the first, called, and made a genteel demand for One thousand guineas, which he said the gentleman had lost to him the night before. The poor gentleman certainly did not recollect his losing better than he did his winning : But having acquiesced in the gain, he could not in honesty and honour refuse the loss ; so was made Seven hundred guineas poorer. If a jury shall bow and submit to be praised for not perjuring themselves in one case where they happen to agree with the Judges, they must expect to crouch under censure in another case where they happen to differ. All encroachments of one department of administration upon another, whether in the state or in courts of judicature,

ture, should be steadily resisted. If juries shew that resolution which free and independent men serving their country without reward, are well entitled to do, and shall with decent firmness oppose any reprehension, they may be assured that the Judges will forbear to treat them in a manner that is degrading.

THESE considerations, my Lord, are humbly offered with respect to the general duty of a Lord of Justiciary. But it is of particular moment to attend to the *Justice-airs*, or Circuits, in which changes have of late years happened, which, it is apprehended, are by no means for the better.

THE utility of dignified <sup>10</sup>itinerant courts of criminal justice in the different parts of the country was very early discovered by our ancestors. We

trace

trace them in Scotland as early as  
 " Human statute purg'd the general  
 " weal."

The territorial Judges over small districts could no doubt put the laws in execution. But it is necessary that justice should appear at stated times with that *apparatus*, that pomp, which is calculated to strike the imaginations of the people, and inspire a reverence for authority, which will have more effect in preventing crimes, than thousands of executions when the mind is not subdued by sentiments of awe. For this reason, it was, that our acts of parliament, ordered the attendance of Noblemen, Barons and Freeholders upon the Lords of Justiciary in their circuits ; and this was not discharged till the 8 of Queen Anne, when it was declared to be " burdensome and unnecessary." Whether this relaxation was occasioned by

by the too rigorous enforcement of one of the Judges at the time ; or from political views at that critical period of the British monarchy ; or from this country being by that time better tamed, it is not necessary to enquire. But it will be observed, that Sheriffs and their officers, and the Magistrates of each town where a Circuit-court is held, are still obliged to attend upon the Judges during their abode there.

IN order to maintain the proper dignity of the Lords of Justiciary upon their circuits, the expence has always been defrayed by the public. The original mode was, that the bills at each place were reported into Exchequer upon oath, and regularly paid ; and then, indeed, there was a magnificence in the circuits, which fully corresponded with the high ideas of respect which should

should ever be entertained of those to whom the greatest trust in human society is committed. But there having been manifest abuses of this liberal permission, it was thought adviseable that there should be a sufficient limited allowance; and that the Judges should take the trouble of holding the public purse appropriated to the circuits, and laying out the money to the best advantage.

THIS allowance is L. 150 for each Judge upon each circuit, with the addition of L. 30 for each Judge upon the northern circuit, amounting altogether to *One thousand nine hundred and twenty pounds per annum.*

CHARLES FOX, in one of his late ebullitions of railing, said, in the House of Commons, that the whole civil establishment

blishment of Scotland was *a job*. It were a pity if the least countenance were given to such a reproach, by even a suspicion that any of the money which is allowed by the public for maintaining the dignity of criminal justice in the circuits, is pocketed by the Judges. How shameful would it be, if, upon a complaint from any of the freeholders, or burgesses, or jury-men, who attend upon the circuits, the matter should be taken up in Parliament, should come under the comprehensive view and keen inquiry of Mr *Burke*; and the bills paid by the Judges to inn-keepers, together with accurate accompts of the expenditure of the whole of the circuit-money, should be ordered to be laid before the House, and it should be found that one half, one third, one fifth, or even any part of it, is made a *perquisite* ?

My

My Lord.—To interfere, even in discourse, with the management of a man's private fortune, or of the salary which he receives for an employment, is officious, is impertinent. But every person who, by paying taxes, contributes to a fund for a public purpose, has a right to inquire into its application. The salaries of the Judges are their freeholds, their estates. But the money allowed for the expence of the circuits is entrusted to them as stewards for the public.

THE sum of L. 300, which is allotted for each western or southern circuit, and L. 360 for each northern, can well afford a very respectable establishment. Though the act 20 Geo. II. says, That “the Judges shall continue “ by the space of six days at the least, “ at each town or place where the circuit-courts shall be held, for the dif-  
“ patch

"patch of busines." Your Lordship knows they continue only five days; for the day on which they leave the town early in the morning is reckoned one of the six. There are, in short, only five days on which they entertain at each town. There is no mystery in the matter. *A calculation has been made,* which, were it not thought improper to be too minute, would be printed in this letter. And from thence it appears, that the public purse for the expence of the Circuits will afford no excuse for a scanty penurious appearance.

THE Lords of Justiciary should not contract their travelling equipage into that of a couple of private gentlemen on a jaunt of pleasure, but should remember that it is the train of a Court, composed of different members. Formerly every one of the Judges had his

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led

*Through and  
splashed*

led horse, his *sumpter* in the procession. The disuse of that piece of pageantry, may be forgiven. But the abolishing of a covered waggon for the baggage of the Circuit, though a poultry saving, is a great grievance. Without it, how shall the mace ; how shall the official clothes of the trumpeters ; nay, how shall the record of Court, and the essential papers be carried ? Not to mention the gowns and clothes of others who ought to be decently drest. Without it, there must be such shifts and such pinching as is to be found only in a company of strolling players.

SHALL the mace, the badge of authority, be crammed into the boot of a coach amongst black-ball, shoe-brushes and curry-combs ? The trumpeters be forced to ride in their official clothes,

clothes, and look shabby? The embroidered G. R. upon the breast of their coats, be turned out to the rain and the tempest, by the King's own Judges, as poor King Lear was turned out by his own daughters? The record of Court, the indictments, criminal letters, precognitions, &c. &c. &c. must be at the mercy of the weather. The four pleas of the Crown, may be blown about by the four winds of heaven, and murders, robberies and rapes be scattered over the land.

THE clerks and other officers of Court, are entitled to comfortable accommodation upon the Circuits. The voice of these useful men; modest, patient and long suffering as they are, will at length be heard by those who can give them redress.

THINK

THINK not, my Lord, that any thing which derogates from dignity, is consistent with the important office of a Lord of Justiciary. The Act 1672, by which the Justiciary Court is constituted, provides, “ That for “ the *splendour* of that Court, all the “ Judges sit in red robes faced with “ white.” Without splendour, the intention of the Legislature cannot be fulfilled. Suppose a Lord of Justiciary should sit without any robe at all, would not that be a good reason to deprive him for incapacity? Nothing is more expressive of a changeling, than that he cannot keep on his own clothes.

THINK of the conduct of the Judges of England upon their circuits. They behave in the most courteous manner. They maintain that dignity

nity which the world expects to see. They have every thing upon a large scale of convenience and shew: They have no allowance for the expence of the circuits; yet one of their number at present, who being amongst the youngest, hath as yet gone most frequently the longest circuits, has been heard to say, that notwithstanding, what is done by the High Sheriff, and the customary presents of different corporations, his circuit charges paid by himself, have amounted to L. 400 in one year.

THE time has been in Scotland, when “ THE LORDS” carried the highest veneration through the whole of their progress upon the circuits. The sound of their trumpets was a summons to all ranks, to respect the public criminal justice; and it was respected.

spected. The Noblemen and Gentlemen were entertained handsomely in the Circuit-towns; and every remote inn considered their arrival as a propitious benefit. For it was justly understood, that although imposition was not to be allowed, yet the bills were not to be scanned with critical narrow precision, but to be paid with that free generosity, which is the certain concomitant of true greatness.

THOUGH the Noblemen and Gentlemen of Scotland are no longer bound by law to attend upon the Judges in the Circuit-towns, yet to their credit be it said, they are always ready to pay a willing respect; and miserable will be the state of this country, if ever it should happen that the common people shall lose all reverence for the Judges,

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by seeing them totally neglected by  
persons of rank and influence.

BUT our Noblemen and Gentlemen will certainly not give themselves the trouble of waiting upon the Judges, if the Judges do not shew by their behaviour that they are sensible of the compliment paid to their office. If the Judges do not receive them with due politeness, and entertain them in the manner they are usually accustomed to live, of which the Judges seem to perceive the propriety with sufficient relish, when they do them the honour of a visit at their houses.

To give mean entertainment is unworthy. But it is more provoking when that meanness is palliated by pretences which will impose upon nobody, and which it is a contempt to the understanding

derstanding of the company to offer.  
*debaste their  
high office by  
neggardedly  
living, and*  
Suppose the Lords of Justiciary should gravely tell their guests that they do it from *patriotism*. The company might dissemble; but would it be possible not to despise so pitiful an artifice? If the Judges really should at any time be so exceedingly zealous for *political economy*, ought not the saving to go to the public? And what should we think were they to pocket it themselves? Patriotism is not peculation.

ATTENTION on the part of the Judges to the Nobility, Gentry and Clergy, Magistrates of burghs and Members of Universities, who pay their respects to them, is the common duty of the Judges both of England and Scotland. But the latter have a peculiar call to shew civility to the Officers of the Army. The Criminal Judges of Scotland,

Scotland, as representing the Sovereign, take the command of the military in the towns where the Courts are held, have guard mounted upon their quarters, and give the *parole*. Gentlemen from all parts of the island, men of the world, of the first connections and most perfectly accomplished, may thus for some days be so situated, that they must form an opinion of the official good order of our country, by the behaviour of its Judges.

THE external appearance of the Lords of Justiciary, and their manner of living upon the Circuits, may admit of diversity of argument, and ingenious sophistry. But there is a most serious circumstance to which your Lordship's attention is earnestly demanded: And that is, a practice which has sometimes prevailed of *sharing*

*ring* the duty, so that the Judges can contrive that none of them shall go a full circuit; but one shall sit at one town only, and another only at two; by which means the country is deprived of that administration of justice which has been thought necessary, and for which provision is made by the public.

To oblige both the Judges on each circuit to be present during the whole of it, when there is no business to be done, would be unnecessary strictness. But when there is business, be it civil or be it criminal, how can a Judge answer to his conscience for not attending?

THE ACT 20 Geo. II. took this subject under consideration. " And  
" whereas a doubt hath been entertain-  
" ed,

“ ed, whether it be lawful or compe-  
 “ tent for one Judge to proceed to do  
 “ business in the Circuit Courts when  
 “ his colleague *happens* to be *necessarily*  
 “ absent,”—it is enacted—“that it shall  
 “ and may be lawful for any one of  
 “ the Judges in such Circuit Courts  
 “ to dispatch business, whenever it  
 “ shall *happen* that his colleague shall  
 “ through *indisposition* or other *necessary*  
 “ *avocation* be absent.”

WILL this clause of indulgence, framed for the case of possible *accidents*, in order that business may be dispatched, afford a justification of frequent deliberate intentional absence from business, without the excuse of *indisposition* or any necessary *avocation* whatever? A juryman who serves his country *gratis*, will be fined if he does not send a certificate by a physician or surgeon

“ upon

“ upon soul and conscience” that he is unable to attend. And shall a Judge who receives a salary, be absent from his duty, without so much as offering even the form of an excuse.

His Majesty’s subjects are by law entitled to have the opinion of two Judges upon the Circuit, in questions concerning their lives, liberties or properties, unless when one of the Judges has it not in his power to attend, either by reason of indisposition, or of such an avocation as can be *bona fide* pronounced to be *necessary*.

DEPEND upon it, my Lord, that there is more risk than is perhaps apprehended. If the objection of the *illegal absence* of one of the Judges shall be moved at a Circuit-court, and a trial proceed, upon which condemnation ensues,

sues, the sentence will be rescinded *per modum justitiae*, and the matter be brought under a cognisance, the result of which may be extremely disagreeable.

It would be invidious, and not in the spirit of this well-meant address, to mention particular instances, which if required, may be done. It is enough to say in general terms, that some things have happened at Circuit Courts, where one Judge only was present, which could not have happened had there been two; and that if these things had not been remedied by superior power, the state of men in this country would have been lamentable.

Not only is it requisite, that both the Judges shall attend at each town upon the Circuit, where there is business, but that they shall both attend  
the

the Court. For to *share a trial*, at least without being in concert with regard to it, may have a woful effect. One actual example shall be given. Some years ago, a man was tried at a Circuit Court at Glasgow, for stealing sheaves of corn from a field in a harvest night. Both the Judges were in the town; but one only attended the Court in the forenoon. The proof was taken, and that Judge gave a charge to the jury, expatiating on the heinousness of the crime of robbing the industrious husbandman in the season of rest. In the afternoon, *that* Judge had some avocation, and the other came to Court and received the verdict of the jury, which was *guilty*.—*This* Judge viewed the criminal as if he had been one of the gleaners in Thomson's Seasons; treated the fact as a trivial offence, and expressed surprise, that the public prosecutor

secutor should have brought it before the Court. The Advocate-depute in his own vindication, was obliged to take notice in open Court, that he was sorry to find his Lordship disapprove of the trial. But that his Lordship's brother had expressed himself very differently. What must have been the feelings of the jury and of the audience upon that occasion ?

THE office of one of the Judges of the High Court of Justiciary, is indeed an arduous trust. But when honest and honourable intentions are joined with knowledge and abilities, the faithful execution of it may be of the greatest benefit to society ; may teach men to “ fear GOD and honour the King ;” and by not hurting others, to enjoy peace and quietness themselves.

*to be sens  
of the exces  
of subordinat*

